NEW MEXICO DEPARTMENT OF HEALTH AND ENVIRONMENT

ENVIRONMENTAL IMPROVEMENT DIVISION

IN THE MATTER OF:

BOKUM RESOURCES CORPORATION
PROPOSED DISCHARGE PLAN, DP-43

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SUMMARY STATEMENT BY SANDOVAL
ENVIRONMENTAL ACTION COMMUNITY (SEAC)

This summary statement by Sandoval Environmental Action Community (SEAC) will address the question of whether the proposed discharge plan of applicant Bokum Resources Corporation (BRC) has adequately considered the reasonably foreseeable future uses of the groundwater that will or may be affected by the discharge of its mill tailings, and whether it has adequately protected that use against unacceptable contamination. SEAC will leave to the direct testimony of New Mexico Citizens for Clean Air and Water, Southwest Research and Information Center and the direct testimony and brief of the Environmental Improvement Division (EID) staff discussion of such technical areas as the adequacy of the diversion ditch, the tailing dam, and planning, for the Probable Maximum Flood, and SEAC joins in the arguments and brief submitted by those parties. This brief will instead focus on what future use BRC is required to plan for, and what uses are indeed foreseeable, within the meaning of Water Quality Control Commission regulations.

I. THE REGULATIONS REQUIRE ADVOCATES OF PROPOSED DISCHARGE PLANS TO PROVE THAT NO TOXIC POLLUTANTS WILL BE PRESENT AT ANY PLACE OF WITHDRAWAL OF WATER FOR POTENTIAL FUTURE USE.

BRC's proposed discharge plan will result in the dumping of highly toxic substances in high concentrations into the tailings

found at Marquez. The Director of the EID may approve such a plan unless:

> "the person proposing to discharge demonstrates that approval of the discharge plan will not result in...the presence of toxic pollutants at any place of withdrawal of water for present or reasonably foreseeable future use."

Water Quality Control Commission Regulations, §3-109-(C)(3) (as amended 12/77).

Moreover, the director is prohibited from approving a discharge plan for

> "the discharge of any water contaminant which may result in toxic pollutants being present in the groundwater at any place of withdrawal for present or reasonable, foreseeable future use."

Id., §3-109-G [emphasis added]. Hence, unless BRC's testimony and evidence has succeeded in meeting this standard, approval of the discharge plan must be denied.

Much discussion at and prior to the hearing has centered on the meaning of the words "reasonably foreseeable future use." SEAC contends that while this phrase has been subjected to two interpretations, only one is viable in the context of the regulations and their purpose. Unfortunately, reliance upon the grammatical construction of the disputed phrase above is not, terribly helpful.

As noted by counsel for SEAC during closing argument, the difficulty with the English language is that one cannot tell whether the words "reasonably foreseeable" modify "future" or "use." This may be demonstrated by referring to the phrase "light green coat." If "light" modifies "green," we may have a heavy coat of light green color. If "light" modifies "coat," we may have a light coat of dark green color.

Similarly, "reasonably foreseeable" may modify "future" or "use," resulting in very different meanings. If use during the "reasonably foreseeable future" is the sole concern of the WQCC

regulations, then use by distant future generations is of no concern to the director. If future use which may reasonably be foreseen is protected, however, than the length of time into the future when such use may occur is irrelevant; it matters only whether one can reasonably anticipate that it will occur.

These two markedly different concepts may be recast as: "plannable" future use (i.e., use during the reasonably foreseeable future) and "potential" future use, (i.e., future use which is reasonably foreseeable). Since either approach is acceptable grammatically, the interpretation of the phrase must derive from the purpose of the regulations and the sense that can be derived from each approach.

To say that the regulations control only use during the "reasonably foreseeable future" makes sense only if the sole concern of the regulations is to limit the imposition of burdens on discharges. It is true that engineering can never be perpetual; everything made by man requires maintenance eventually. This interpretation would consider how far man can reasonably plan, and then concede that beyond that horizon, future generations will have to fend for themselves.

The problem with this interpretation is that there is nothing to support it in the regulations. Dischargers are not supposed to simply do the best they can, they are supposed to protect the public. It would be highly inimical to public policy to issue a carte blanche to dischargers to destroy whatever usable groundwater they choose, so long as they defer the damage to our great grandchildren. While contamination of water is not strictly forbidden, but only limited, nothing suggest that unlimited contamination is acceptable now or at any time in the future.

The alternate interpretation, "that future use which may reasonably be foreseen" is far the stronger. This can be seen immediately from the statement of purpose in §3-101(A) of the

Regulations:

> "The purpose of these regulations controlling discharge into or below the surface of the ground is to protect all groundwater of the State of New Mexico...for present and potential future use as domestic and agricultural water supply...."

Use of the phrase "potential future use" proves that the "reasonably foreseen" modifies "use." No one could seriously maintain that the regulations are addressing the "potential future." In fact, the words "reasonably foreseeable" are a means of more precisely defining what potential future use is at issue. Not all potential future use that may be conceived by human ingenuity is the concern of the regulations, only that potential future use which can reasonably be foreseen.

The statement of purpose in the regulations is helpful not only for linguistic analysis, but also to provide the policy context for the adoption of 3-109(C) and (G). The regulations were adopted to protect the citizens of this State against loss of use of groundwater because of industrial contamination. It is absurd and specious to claim that only living generations are intended to benefit by such a policy, as would the interpretation contended for by BRC. This is not to suggest that BRC must come up with a design for a tailings dam or diversion channel to last, effectively, forever. Rather, it is SEAC's contention that their plan is unacceptable if it relies, for protection of groundwater against unacceptable levels of contamination, upon any manmade structure. This would probably mean keeping it out of any flowing arroyo, and certainly out of the area contemplated by the discharge plan.

One further point is necessary concerning "reasonably foreseeable future use." BRC has premised its entire tailings disposal plan on the assumption that the groundwater, under the tailings pond itself is expendable, so long as it is withdrawan legally from use. Nothing in the regulations supports that assumption; on

the contrary, it is clearly incorrect. Section 1-101(M) defines groundwater as a interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply [emphasis added]. No well need actually exist now so long as one may be drilled that would be contaminated. As 3-101(A), quoted above, states, "the purpose of these regulations...is to protect all groundwater of the State of New Mexico..., at least if it is now usable. There can be no question that an existing supply of usable water, under the tailings disposal site itself, will be polluted beyond use by the discharge of tailings. Whether BRC has adequately established that future use of such water may not reasonably be foreseen is the subject of the next section.

II. THE LEGAL RESTRICTIONS ON USE OF THE GROUNDWATER UNDER THE TAILINGS POND ARE INEFFECTIVE AND INADEQUATE

A. The common lands of the Juan Tafoya Land Grant

BRC rests its attempt to demonstrate that no future use is reasonably foreseeable for the groundwater under the tailings pile upon a single document; a March 23, 1979, restrictive covenant, contained in Bokum Supplemental Submission Apprendix F, February 5, 1979. E.I.D. Ex. 1-C.

That agreement supplements an earlier "sale" agreement by the Juan Tafoya Land Corporation to Bokum of certain common lands of the Juan Tafoya Land Grant. As testified by Mr. McBride, counsel for the Juan Tafoya Land Corporation, and as appears from BRC's own exhibits, supra, this land in fact represents the bulk of the land intended to serve as the tailings disposal site. Vol. V, Tr. 1082-1085.

The May 3, 1978, purchase agreement (Appendix F, supra) between the land grant and BRC provide that the land reverts to the land grant (now the land corporation) after BRC is finished with it.

Vol. V. Tr. 1092. BRC is even required to revegetate the land to again make it usable for grazing. As BRC witnesses Billings and McBride admitted in cross-examination by counsel for SEAC, the intended use of the land for grazing in the future could make it attractive for drilling to water stock. (Cross-Examination of Dr. Billings by Mr. Biderman: Vol. II, Tr. 203-205; Cross-Examination of Mr. McBride by Mr. Biderman: Vol. V, Tr. 1092-1094). Depending on how the land and water rights may be divided among future successors in interest, it may well be that a future stockowner would have no choice but to drill on that land for water. Vol. II, Tr. 204.

BRC relies on the above-mentioned restrictive covenant which prevents drilling or excavating on the tailings pond for perpetuity, and runs with the land to all successive owners. Even assuming the ridiculous proposition that records will be recognizably maintained in the County Courthouse for thousands of years, the covenants do not prevent future use. For one thing, who would have any interest in enforcing such a covenant? Neighbors would be unlikely to care, especially if the water in question is removed from their wells. BRC will not be around once its dam is finished. The covenant would be a piece of paper to which no one would pay attention.

Moreover, the covenant could be challenged. As SEAC's supplemental submissions demonstrate, a Petition-In-Intervention was filed April 26, 1979, and is now pending, in the lawsuit which placed the ownership of the Juan Tafoya Land Grant in the land corporation. That Petition-In-Intervention contends that certain heirs to the land grant have received inadequate shares of the corporation. Should the petitioners in that proceeding be successful, their shares in the corporation would be increased.

This, however, may in turn impact on the validity of

the restictive covenant. The directors of the land corporation were elected by majority of the shareholders, according to their number of shares, §53-11-33(A), Business Corporation Law. (The Land Corporation is a business corporation governed by the Business Corporation Act; see Articles of Incorporation of Juan Tafoya Land Corporation, filed with SEAC's Supplemental submission). If those shares were improperly distributed among the members, voting rights were, too. §53-11-6(A) thus permits the shareholders to challenge the authority of the board; even if that is not directly sought by the Petition-In-Intervention, it could be a result.

An additional basis for challenge of the March, 1979, Supplemental Agreement was in the fact that the record reflects no approval of it by the District Court as was obtained for the original March 31, 1975 lease to BRC by Juan Tafoya Land Grant. Indeed, while the May 3, 1978, purchase agreement recites that approval of the District Court would be obtained for it, the record reveals no such approval.

Even if approval of the 1978 purchase agreement were assumed, the failure to obtain approval of the March, 1979, supplemental agreement could be the subject of challenge by someone opposing the restrictive covenant. Although court approval of new agreements by the land corporation would not have been required once it is incorporated, the 1979 agreement was not a new agreement. As clearly recited in that document it is a "supplement" to the May, 1978, purchase agreement that was "inadvertantly overlooked." Hence, since the intent of the parties was to include this provision at the time the 1978 agreement was entered into, if the court approved that 1978 agreement it did so without knowing all the terms and provisions before it. Therefore, either any court approval of the 1978 agreement was incomplete, or the 1979 supplemental agreement required separate approval to be added to the old agreement. Either way, the supplemental agreement is open to attack.

B. El Bosque Tract

Thus, the arrangements designed to prevent water drilling on the common lands are inadequate. As to the tract designated "El Bosque" on BRC's map of the tailings disposal site, (E.I.D. Ex. 1-C) however, the problem is still greater. This land is sold by its owners to BRC with a provision for reversion, Coll testimony at Vol. VI, Tr. 1485; referring to Appendix F-5; BR Ex. 17. Whatever effect a restrictive covenant may have, none is even present as to this tract. The owners could legally drill for water the day that BRC leaves. Yet this land leads right over the tailings basin.

C. Whether the Use of Polluted Water Is Unlikely Is Not A Proper Consideration For This Proceeding.

BRC is thus left with the glib statement of Dr. Billings that no one is likely to want to use this water because it will be so contaminated as to be unusable. Vol. II, Tr. 202. The problem with this argument is that it does not discharge BRC's obligations under the WQCC regulations. It should be recalled that these regulations protect all groundwater that may be used against unacceptable contamination, §§1-101(M); 3-101(A); 3-109(C)(3) and (G). BRC's argument amounts to a claim that one may satisfy the requirements of the groundwater protection regulations simply by contaminating groundwater so severely that no one would any longer consider using it! The point of the regulation is obviously not to permit unlimited contamination of groundwater by finding that no reasonable person could foreseeably be expected to use contaminated water. The purpose is the exact opposite: to ensure that no groundwater that people may someday be expected to use will ever be unavailable to them because of excessive contamination. As to the groundwater under the tailings disposal site, BRC has clearly failed to meet its burden under the regulations.

BRC suggest further that the recently enacted Federal Uranium Mill, P.L. 95-604 (November 8, 1978); 42 U.S.C., 7901 et. seq. Radiation Control Act of 1978, ensures against future use of the groundwater under the tailings pond. Their analysis presumably is that the federal government will purchase the land or ensure that the state does.

It is true that §202 of that Act amends the Atomic Energy Act of 1954 to add a new section 83. That section provides that the U. S. Government or the State of New Mexico may be required to take title to the land, at §83(b)(1). This is qualified, however, by the obligation of the [Nuclear Regulatory] Commission (NRC) in §83(b)(2) to determine whether the public health, safety and welfare even requires purchase of the land. If the use of either surface or subsurface lands would not be dangerous, then the NRC must allow its owners to continue using it; and the U.S. or State acquire title only to the tailings themselves. §83(b)(1)(B).

This has several implications for this case. Use of the surface may not, in itself, jeopardize public health; hence the NRC would indeed have to allow grazing despite its power to acquire land if it finds it necessary. But this once again renders drilling for water a reasonably foreseeable use in the future. On the other hand, BRC's agreement to allow the land to revert to the Land Corporation (and, in the case of El Bosque, to its owners) may be invalidated if the NRC finds the land dangerous even for grazing alone. In either case, future groundwater used by the sellers of these lands remains reasonably foreseeable unless it is so contaminated that the NRC must effectively condemn it. In that case, groundwater that could be used will be withdrawn from use by reason of BRC's contamination of it. Yet this groundwater is protected

against just such an eventuality by the WQCC regulations. Future users are to be prevented from losing it, not protected against using it.

III. THE PROPOSED DISCHARGE PLAN DOES NOT ADEQUATELY PROTECT PRESENT AND POTENTIAL FUTURE GROUNDWATER USERS AGAINST UNACCEPTABLE LEVELS OF CONTAMINATION BY THE TAILINGS WASTE.

Considerable testimony in the recrod establishes that downstream of the tailings pond are numerous potential users, as well as present users of groundwater. The first tract of land in issue is identified on E.I.D. Ex. 1-C (Appendix F-3) as Tract 5A. It is admitted by BRC's prefiled testimony that BRC has no ownership interest in this land, which is located near the confluence where BRC will recommend withdrawal of water. §B-17 of BRC February 5, 1979, Supp. Submittal to EID, p. 35; E.I.D. Ex. 1-C.

Further down the Rio Salado which is fed by the Canon de Marquez, the Lagunas project substantial growth in use of the Majors Ranch which abuts the Salado to the North (Cross-Examination of Governor Correa by Mr. Biderman, III, Tr. 422-444; S.E.A.C. Ex. 2). Governor Correa and witness Milton Cheromiah of the Mountain Cattlemen's Association, further pointed out the use of the Rio Puerco downstream of the Salado for watering stock and for domestic consumption (Correa, id. Direct Examination of Milton Cheromiah by Mr. Biderman, III, Tr. 415-420; Redirect-Examination of Milton Cheromiah by Mr. Biderman, III, 498-499; S.E.A.C. Ex. 3). Further still downstream, extensive use of the groundwater from the Rio Puerco is foreseen for the Navajos at Canoncito. (Statement of Tony Secatero; V, Tr. 1076-1079). All of these users have appeared to protest the proposed discharge plan, particularly since their extremely long habitation of the area forecast to their continued use for centuries to come, at least. The presence of perpetual springs in the Canyon de Marquez itself forecast further that there will always be users of these groundwaters, at least for so long

as we can predict with any degree of reliability.

Many questions have been raised through these proceedings questioning the integrity of the BRC's plan to contain its wastes for as long as necessary to protect these present and potential future users against excessive contaimination. It must be recalled that §3-109(G) requires the directors to disapprove a plan that even "may result in toxic pollutants" in such groundwater. Clearly, this places the burden on the applicant, BRC, to show that no pollution is possible.

Other parties have addressed the issues of the adequacy of the rip-rap design for the diversion channel, the effect of the accumulation of sediment and the slope of the channel, the lack of design details in the record for the cutoff trench, slurry line and tailings management plan; and the total disregard for a spillway from the tailings down as required by the State Engineer. Moreover, problems have been raised concerning the possibility of piping, and the effect of a definite solution on the underlying shales.

Of particular concern to SEAC is the way in which the discussion in Point II, supra, bears upon the post-operational monitoring and maintenance of the tailings dam. Nothing in the agreement between BRC and Juan Tafoya Land Corporation or its predecessors guarantees BRC access to the tailings dam or any place else on the tailings pile; nor is access after reversion demonstrated as to the El Bosque tract, which overlies a segment of the tailings dam. Assuming no further fragmentation of property rights, a minimum of two owners or group of owners will have to approve to ensure BRC, or the state, access to the tailings dam for maintenance of it. Yet such maintenance will be essential to prevent the tailings dam and diversion ditch from eventually

breaching, and possibly for the arroyo to reestablish itself along its existing path-carrying toxic tailings downstream along the Rio Salado and Rio Puerco. Even were any perpetual assumption of responsibilities conceivable to human affairs, BRC's failure to ensure its access for post-operational maintenance renders any such plan vacuous.

IV. THE POSSIBILITY OF DISCHARGE OF TOXIC POLLUTANTS INTO GROUNDWATER THAT COULD BE USED IN THE REASONABLE FORESEEABLE FUTURE HAS NOT BEEN PUT TO REST BY THE APPLICANT'S PLAN AND SUPPORTING TESTIMONY.

The uncooperative and irresponsible posture of the applicant throughout the permitting process is a relevant consideration in the determination of whether the proposed discharge plan could result in contamination of groundwater. Since no groundwater discharge plan can possibly consider each and every contingency that could arise during the operation of such a facility, the posture of an applicant is important. Further, reference to mutual consent between the applicant and the Environmental Improvement Division is seen in several sections of the Bokum proposal. If we have little evidence of cooperation at the application stage, how can be be assured that mutual consent will ever be reached? Therefore, the willingness of the applicant to work in a cooperative and responsible fashion with the state must be considered by the Director as a factor in whether the requested permit should be granted.

Throughout the permitting process, the applicant has demonstrated a singular lack of concern for important questions raised by state agencies concerning the design of this tailings facility. Bokum Resources Corporation's lack of compliance with the State Engineer's Office requirement that any modification of the plans submitted in support of a permit be filed with the State Engineer is illustrative of this posture. Similarly, Bokum's apparent disregard for the recommendations of the Environmental Improvement

Division to cease construction of the tailings facility as discussed in the Director's letters of November 30, 1978 and December 8, 1978 which are contained in EID Ex. 4 support this contention concerning the applicant's unwillingness to act with a cooperative spirit. Further, applicant's failure to provide for their access to the tailings area after decommissioning and their failure to adequately deal with problems of the long term implications of twenty-two million tons of uranium mill tailings created and deposited by them, indicates applicant's lack of concern for the protection of groundwaters from future possible contamination. Finally, the fact that over half of the construction of the tailings areas has been completed without the benefit of a permit and in the face of serious questions concerning design, illustrates applicant's lack of conern for the needless disturbance of 350 acres of extremely complex and fragile watershed which may never be approved as an adequate repository of uranium mill tailings. There is no guarantee that this pattern of behavior by the applicant will not continue to the detriment of the groundwaters of New Mexico.

CONCLUSION

This brief has focused primarily on land ownership rights and their impacts on the adequacy of Bokum Resources Corporation's discharge plan. SEAC urges the Director, however, to consider not only the strength of these technical and somewhat legalistic arguments, but also the overriding nature of this proposal. BRC has put forward a plan that effectively guarantees at some future time that groundwater users will be subjected to contamination by long-lived radioactive waste materials. No signs can be posted; no fence errected; no structure can be engineered nor any plan implemented; no law can be passed or contract written, to protect

future generations against the folly of this plan. The water quality control regulations strictly forbid such a result. But even if it could be found that they do not, it is the duty of the director to protect the state's water users against such folly by denying the requested permit. To do less is to admit the ineffectiveness of this state's regulatory agencies to protect its people against violation of their single most essential resour an admission that need not be made.

Respectfully submitted,

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